



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

(Coram: A. C. Mrima, J.)

PETITION NO. 104 OF 2020

KAPS PARKING LIMITED.....1ST PETITIONER

PAYTECH LIMITED.....2ND PETITIONER

-VERSUS-

THE COUNTY GOVERNMENT OF NAIROBI.....1ST RESPONDENT

NAIROBI CITY COUNTY ASSEMBLY.....2ND RESPONDENT

JUDGMENT

Introduction:

1. The Petitioners herein, *Kaps Parking Limited* and *Paytech Limited*, are limited liability companies. They are engaged in the business of offering the services of private vehicle parking within Nairobi County.
2. The 1st Respondent is the County Government of Nairobi and the 2nd Respondent is the Nairobi City County Assembly. They are both established by Article 176 of the Constitution.
3. In this Petition, the Petitioners are variously challenging the enactment of The Nairobi City County Finance Act, 2018.
4. The Petition is opposed.

The Petitioners' case and submissions:

5. The Petition is dated 9th March, 2020. It is supported by two Affidavits. One of the Affidavits is sworn on 9th March, 2020 by *Lawrence Madialo* on behalf of the 1st Petitioner. The other Affidavit is evenly sworn by *Christine Githiri* on behalf of the 2nd Petitioner.
6. The Petition is further supported by the Petitioners' written submissions dated 19th October, 2020. The Petitioners' Counsel made further oral highlights on the submissions.
7. The Petitioners do not contend the fact that the Respondents are constitutionally and legally mandated to raise revenue. They, however, contend the manner in which The Nairobi City County Finance Act, 2018 (hereinafter referred to as '***the Finance Act, 2018***') was enacted into law on three main grounds.
8. The first ground has three components. One of the components is that the Finance Act, 2018 was passed outside the 90-days' timeline provided for by the Constitution, the Public Finance Management Act No. 18 of 2012 (hereinafter referred to as '***the PFM Act***') and the Nairobi City County Assembly Standing Orders, 2017 (hereinafter referred to as '***the Standing Orders***'). The next one is that the Finance Act, 2018 was not published in the County Gazette and the Kenya Gazette. The last component is that enactment of the Finance Act, 2018 was not preceded by the views of the Cabinet Secretary and the Commission on Revenue Allocation.
9. The second ground is that the Finance Act, 2018 was passed without any or adequate public participation.

10. The third ground is that the Finance Act, 2018 is discriminatory and punitive.
11. The Petitioners' case is precisely pleaded in the Petition and reinforced in the submissions.
12. On the first ground, the Petitioners contend and submit that the Finance Act, 2018 was enacted outside the 90-days' timeline in violation of Article 190(2) of the Constitution, Section 133 of the PFM Act and Standing Order No. 229. It is alleged that since the Nairobi City County Appropriation Act was passed on 27th June, 2018, then the Finance Act, 2018 was to be passed by the 27th September, 2018. Given that the Finance Act, 2018 was eventually passed on 4th December, 2018, then the same is in contravention of the Constitution and the law and cannot, therefore, stand.
13. The decisions in *Speaker, Nakuru County Assembly & 46 Others vs. Commission on the Revenue Allocation & 3 Others (2015) eKLR* and that of *Tyson Ng'etich & Another vs. Governor, Bomet County Government & 5 Others (2015) eKLR* were cited in support of the contention.
14. Responding to the 2nd Respondent's argument that the 2nd Respondent complied with the law as it relied on Section 90 of the PFM Act to enlarge the time, the Petitioners drew the Court's attention to Article 93(1) of the Constitution which provides that the Parliament of Kenya only consists of the National Assembly and the Senate and not the County Assemblies. Further, it is argued that Section 90 of the PFM Act is under Part III thereof which provides for National Government Responsibilities with respect to the Management and Control of Public Finance and not under Part IV which provides for County Governments.
15. The Petitioners argue that the no law provides for the extension of time including the Standing Orders.
16. As a result, the Petitioners contend that Section 90 of the PFM Act does not apply to proceedings before the County Assemblies and cannot be the basis for the extension of time. The Petitioners, hence, invites the Court to annul the Finance Act, 2018 even on that ground alone.
17. The Petitioners further argue that the Finance Act, 2018 was not published in the County Gazette and the Kenya Gazette as required in law. The Petitioners submit that Standing Order 127 requires a Bill be published in the County Gazette and/or the Kenya Gazette at least seven days or such shorter period from date of its publication and as a prerequisite to introduction of such a Bill before the 2nd Respondent's house for the First Reading. In this case, it is argued, that the Finance Bill 2018 was neither published in the County Gazette and Kenya Gazette nor did the requisite period lapse before the Bill was introduced into the House for the First Reading on the 2nd October 2018.
18. On the 2nd October, 2018, it is argued, several unprocedural issues happened. First, the 2nd Respondent proposed the reduction of publication period for the Finance Bill from seven to six days. Second, the 2nd Respondent passed a motion extending the time within which the Bill was first introduced into the House. Third, the House purportedly conducted the First Reading of the Finance Bill even before the Bill was published.
19. The 2nd Respondent is further cited for contravening Standing Order 128(2) which provides that in matters relating to Appropriation Bill or Finance Bill not more than one stage may be conducted at the same sitting. In this case, the 2nd Respondent in its sitting of 4th December, 2018 purportedly conducted both the Second and Third Reading of the Finance Bill 2018 as well as the Committal of the Finance Bill 2018 to the Committee of the whole County Assembly; all in a single sitting of the House.
20. Relying on *Robert N. Gakuru & Others v Governor Kiambu County & 3 others [2014] eKLR* and *Attorney General & another v Coalition for Reform and Democracy & 7 others [2015] eKLR*, the Petitioners called for the quashing of the Finance Act, 2018 on the basis of the illegality on the face thereof.
21. The Petitioners also argued that the Finance Act, 2018 was enacted in total disregard to Section 161 of the PFM Act and Article 209(5) of the Constitution. In particular, the Petitioners contend that the views of the Cabinet Secretary and the Commission on Revenue Allocation were not sought before imposing the tax.
22. The Petitioners contend that the impugned fees were raised from Kshs. 30,000 –Kshs. 100,000 to Kshs. 200,000 – Kshs. 500,000 and is hefty, unfair, punitive, unbearable, and excessive and as such they predispose the Petitioners and other stakeholders to massive losses. This exorbitant increase in licence fees is prejudicial to national economic policies and economic activities across Nairobi County as it will lead to massive losses and winding up of businesses and is therefore contrary to Article 209(5) of the Constitution.
23. The Petitioners further contend that they have demonstrated that the imposition of the exorbitant parking rates as contained in the impugned Finance Act, 2018 would be catastrophic to its very existence. This constitutes clear prejudice to the national economic policies, economic activities across county boundaries and the national mobility of goods, services, capital or labour contrary to the provisions of Article 209(5) of the Constitution. The provision of the Finance Act 2018 on license fees for parking services to the extent that they offend Article 209(5) of the Constitution are a nullity and should be declared as such.
24. The Petitioners further challenge the Finance Act, 2018 on account of lack of adequate public participation or at all.
25. It is alleged that public participation is a requirement of law and is provided for under Article 10 of the Constitution which provides for National values and principles of governance that are to apply to every State organ, State Officer and public officer whenever any of them inter alia enacts, applies or interprets any law. One of the values under Article 10(2) of the Constitution is participation of the people.
26. The Petitioners also allege that Article 174 (c) of the Constitution is to the effect that '*... the objects of the devolution of government are...To give power of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State*

and in making decisions affecting them...’ Further, Article 196(1)(b) of the Constitution also urges County Assemblies to provide for public participation in the legislative and other business of the assembly and the committees whereas Article 201(a) of the Constitution which is on the principles of public finance also calls for openness and accountability, including public participation in financial matters. There is also Section 87 of the County Government Act, No. 17 of 2012 which also provides for citizen participation in the affairs of the county governments as well as Section 115 of the County Government Act which provides for mandatory public participation in the county planning processes to be facilitated through mechanisms provided for in Part VIII of the Act.

27. It is submitted that in compliance with the foregoing provisions of the law the 2nd Respondent made provisions for public participation under Standing Order 131 which provides *inter alia* that: -

The Sectoral Committee to which a Bill is committed shall facilitate public participation and shall take into account the views and recommendations of the public when the committee makes its report to the County Assembly.

28. The Petitioners vehemently hold that public participation is, therefore, at the center of the 2nd Respondent’s legislative power. They submit that there was no proper public participation as contemplated under Article 10, 174, 196 and 201 of the Constitution and Section 87 and 115 of the County Government Act, 2012 as no notices were carried out either in local dailies, local radio stations and local television stations sensitizing the Petitioners and other members of public of the intended passing of the Finance Bill 2018 and contents of the Bill.

29. The decisions in *Robert N. Gakuru & Others v Governor Kiambu County & 3 others [2014] eKLR*, *Pwani Super Capacity Transporters Savings & another v County Government of Mombasa [2020] eKLR*, *Doctors for Life International vs. Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC)* and *Glenister vs. President of the Republic of South Africa and Others (CCT 48/10) [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651(CC)* were referred to in support of the submissions.

30. It is the Petitioners further submission that public participation in the instant case ought to have entailed giving the public access to the Finance Bill 2018; informing the public of where and how they could access the Finance Bill 2018; engaging in wide dissemination of information with regard to the Finance Bill 2018 by use of as many fora as possible including but not limited to publication in local dailies; and providing adequate time for studying of the Finance Bill 2018 and preparing submissions on the Bill. However, the Petitioners’ submit that the 2nd Respondent did not comply with the requirement of public participation as required above. There was no publication of the Finance Bill 2018; there was no information on where and how the Bill could be accessed; there was no advertisement in any local daily and no sensitization on any planned hearings regarding the Bill; there was no dissemination of information on the Bill and zero sensitization of the public and therefore the public was not made aware of the Finance Bill 2018 and contents therein; and the 2nd Respondent did not afford the public adequate time and opportunity to study the Bill and prepare for any hearing.

31. On the 2nd Respondent’s contention that public participation was duly conducted, the Petitioners contend that the 2nd Respondent has not shown minutes of the alleged meetings of 29th and 30th October 2018; publication of invitation to members of the public to submit their views on the Finance Bill 2018 has also not been exhibited; the published Finance Bill 2018 that was allegedly the subject of the purported public hearings of 29th and 30th October 2018 has also not been shown and/or where and how the Bill could be accessed. Further, there has been no proof exhibited by the 2nd Respondent to show that it sensitized members of the public on the Finance Bill 2018 which being a legislation on payment of taxes and levies, the duty was even more onerous and required the 2nd Respondent to make use of as many avenues as possible to bring the Bill and contents thereof to the public as held in the case of *Robert N. Gakuru* (supra).

32. The Petitioners, therefore, submits that since there was no public participation, the enactment of the Finance Act 2018 is unconstitutional for being in contravention of Articles 10, 174, 196 and 201 of the Constitution.

33. As to the discriminatory and unitive nature of the parking fees provided for in Finance Act, 2018, the Petitioners contend that Article 27 of the Constitution is clearly derogated.

34. Upon referring to the decisions in *Willis v The United Kingdom No. 36042/97, ECHR 2002* *Dennis Itumbi v Attorney General & 2 others [2018] eKLR*, *Harksen v Lane NO and Others (CCT9/97) [1997] ZACC 12; 1997 (11) BCLR 1489; 1998 (1) SA 300* and *Mohammed Abduba Dida v Debate Media Limited & another [2018] eKLR* the Petitioners contend that the said proposed changes in the license fees to be paid to the 1st Respondent by the Petitioners as private vehicle parking service providers is discriminative against the private vehicle parking service providers as compared to other service providers and as follows: -

i. In the Finance Act 2015, Hyper supermarkets were paying a license fee of Kshs. 120,000 while in the Finance Act 2018 the increase is only to Kshs. 150,000;

ii. In the Finance Act 2015 super large communication company (mega communications company) were required to pay Kshs. 200,000 as license fees for storage and in the Finance Act 2018 the amount has not changed;

iii. In the Finance Act 2015 large industrial plants paid Kshs. 150,000 which amount has been maintained in the Finance Act 2018; and

iv. In the Finance Act 2015 the Petitioners as private parking service providers paid between Kshs. 30,000 to Kshs. 100,000 while in the Finance Act 2018 the Petitioners are required to pay between Kshs. 200,000 to Kshs. 500,000.

35. The Petitioners submit that it is clear that a comparison of the license fees imposed by the Finance Act 2015 and the proposed fees under the Finance Act 2018 as shown in the above examples depict a trend where license fees for other service providers have either been maintained or marginally increased while the license fees for private vehicles parking service providers has increased by more than 100%.

This differential treatment is discriminatory and contrary to the constitutional requirement of equality and freedom from discrimination as provided under Article 27 of the Constitution.

36. The Petitioners further submit that the differential treatment is unfair and contrary to Article 201(b)(i) of the Constitution providing that burden of tax is to be shared fairly. They relied on **Kenya Flower Council v Meru County Government [2019] eKLR** for the position that ‘.... there is absolute necessity of a mechanism that does not produce unnecessary duplication of taxes and one that averts creation of unduly heavy burden of taxation on particular category of taxpayers’.

37. They further submit that no reason has been afforded as to why the increase in the license fees for the Petitioners is more than 100% whereas other sectors of the County’s economy have either received a reduction in the license fees or minimal increases in the license fees. It is submitted that there is no unique service afforded by the Respondents to the Petitioners as private vehicle parking service providers that warrants the discriminatory, punitive and exorbitant increase in the Petitioners’ license fees as compared to other service providers in Nairobi County. The only logical conclusion is that the hike in license fees is meant as a punishment to the Petitioners who provide competition to the Respondents in the area of parking service provision. It is the Petitioners’ humble submission that the selection or differentiation herein is unreasonable and arbitrary and does not rest on any rational basis and is further contrary to Article 201(b)(i) of the Constitution requiring tax burden to be shared fairly.

38. As to the punitive nature of the provisions on license fees, the Petitioners submit that the impugned provision introduced by the Finance Act 2018 seeks to increase the license fees to be paid by the Petitioners by over 100% in less than a year. The abrupt increase of more than 100% is arbitrary, unreasonable, harsh, burdensome and oppressive and an improper exercise of the 2nd Respondent’s discretion as provided under Articles 185, 209(3), 209(4) and 209(5) of the Constitution and amounts to unfair and unconstitutional imposition of charges. The license fees provided for under the impugned provision which increase the said fees from Kshs. 30,000-Kshs. 100,000 to Kshs. 200,000 – Kshs. 500,000 is hefty, unfair, punitive, unbearable, and excessive and as such they predispose the Petitioners and other stakeholders to massive losses. The harsh license fees are very likely to lead to closure of businesses and consequent loss of economic well-being and the right to earn a living and therefore contrary to Article 209(5) of the Constitution. The Petitioners have several outlets and to expect the Petitioners to pay between Kshs. 200,000 - Kshs. 500,000 for every outlet is punitive on the business of the Petitioners. The Petitioners relied on **Civil Appeal No. 90 of 2016 County Government of Kwale v Kenya Airports Authority [2017] eKLR** for the position that ‘...a County Government was empowered to impose property rates and such power is qualified to the extent that it should not be exercised in a manner that is prejudicial to the national economic policies, economic activities across county boundaries or the national mobility of goods, services, capital or labour...’

39. In the end, the Petitioners pray for the following reliefs: -

1. A Declaration that the Nairobi City County Finance Act 2018 is unprocedural, unconstitutional, null and void for being in violation of Articles 10, 27, 174, 185, 190, 196, 201 and 209 of the Constitutional and Section 133 and 161 of the Public Management Finance Act.

2. A Declaration the 2nd Respondent breached the provisions of Articles 196(1)(b) and 201(a) by failing to afford the Public 1deuate opportunity to participate in the passing of the Nairobi City country Finance Act 2018.

3. A Declaration that Clause 17 Schedule 2.3 of the Nairobi City County Finance Act 2018 is in violation of Article 27 of the Constitution and violates the Petitioner’s right to equality and freedom from discrimination.

4. A Declaration that Clause 17 Schedule 2.3 is unconstitutional, null and void.

5. A Declaration that the Respondents violated the Petitioners’ right to legitimate expectation and right to fair administrative action as per Article 47 of the Constitution.

6. A Permanent injunction to restraint the1st Respondent whether by themselves, their agents, servants, employees or any person acting for and on behalf of the 1st Respondent from implementing the Nairobi City Country Finance Act 2018 and/or Clause 17 Schedule 2.3 of the Nairobi City Country Finance Act 2018.

7. Costs of the Petition.

8. Interests on above at Court’s rate from the date of filing of the petition until payment in full.

9. Any other orders that this Honourable court deems fit and just to grant in the circumstances.

The 1st Respondent’s case and submissions:

40. The Respondents opposed the Petition. The 1st Respondent filed an Answer to the Petition and written submissions both dated 11th December, 2020. The 2nd Respondent filed Grounds of Opposition dated 21st August, 2020, a Replying Affidavit sworn by *Pauline S. Akuku* on 21st August, 2020 and written submissions dated 11th October, 2020.

41. The 1st Respondent pleaded that the Finance Act, 2018 was passed in accordance with the Constitution and the guiding statutes. It also contends that the license fees are annual fees and as such they cannot be said to be punitive, harsh or unbearable since the Petitioners can easily afford the said fees. It further denies any privity to the alleged negotiations.

42. In response to the issue of discrimination, the 1st Respondent aver that the other service providers engage in different businesses from the Petitioners and as such they have to pay different licence fees.

43. On public participation, it is pleaded that an appropriate advertisement was placed by the 2nd Respondent's Clerk in the County website under *submissions of memorandum and public participation* inviting the public to air their views on the amendment of the Nairobi County Finance Act of 2015. The public views were collected by the appropriate Committee on 29th October, 2018 at Waitihaka Social Hall and further on 30th October, 2018 at Jericho Social Hall.

44. As to whether the 2nd Respondent could extend time within which to pass the Finance Act, 2018, the 1st Respondent pleaded that the 2nd Respondent in its mandate under the 1st Respondent has jurisdiction to extend time limit to pass an act into law under Section 90 of the PFM Act. This is owing to the fact that the 2nd Respondent is mandated under Article 185 of the Constitution of Kenya to pass legislation to operationalize the activities of the 1st Respondent.

45. The 1st Respondent further pleaded that at all material times prior to the passing of the Finance Act, 2018 the views of the relevant persons and entities including the Cabinet Secretary and Commissioner of Revenue Allocation were sought. The 1st Respondent also avers that the Finance Bill passed through the first reading on the 2nd of October, 2018.

46. In its submissions, the 1st Respondent dealt with the principles governing the determination of the constitutionality of statutes. It is submitted that when the constitutionality of a statute is challenged, a Court must consider the general rule as laid in ***Tata Chemicals Magadi Limited vs. County Government of Kajiado & 2 others [2019] eKLR***. The rule was cited by the Supreme Court of India in *Hambardda Wakhana vs. Union of India Air [1960] AIR 554* as follows:

In examining the constitutionality of a statute it must be assumed the Legislature understands and appreciates the needs of the people and the Law it enacts are directed to problems which are made manifest by experience and the elected representatives assembled in a Legislature enacts laws which they consider to be reasonable for the purpose for which they are enacted. Presumption is therefore in favour of the constitutionality of an enactment.

47. Further, the Court in *Tata Chemicals Magadi Limited v County Government of Kajiado & 2 others* (supra) cited with approval the case of ***Ndyanabo vs. Attorney General [2001] 2 EA 485*** where it was affirmed that there is a rebuttable presumption that legislation is constitutional hence the onus of rebutting the presumption rests on those who challenge that legislation's status. The 1st Respondent, hence, posits that the burden to prove that the Finance Act, 2018 is unconstitutional is thus on the Petitioners.

48. On the *legality of the Finance Act, 2018* especially on the aspect of passing the Finance Act, 2018 outside the 90-days' window, the 1st Respondent submitted that whereas it is true that the Appropriation Bill was passed by the 2nd Respondent on 27th June, 2018 and accordingly the Finance Bill should have been considered and approved by the 2nd Respondent on or before the 27th September, 2018, Section 90 of the PFM Act was invoked by the 2nd Respondent to extend the time required for consideration and passing of the Finance Bill into law. This was done due to the technicalities of the said Bill which delayed the formulation of the amendments to the Nairobi Finance Act 2015 and had the ripple effect of late submission for consideration.

49. On the averment that the 2nd Respondent is estopped from relying on Section 90 of the PFM Act as it is not a House of Parliament, the 1st Respondent submits that the provision can be relied on by the 2nd Respondent since the 2nd Respondent has been delegated with legislative power at the county level. The legislative power is donated to the 2nd Respondent under Article 185 of the Constitution.

50. As to whether Finance Act, 2018 passed through the First Reading in the 2nd Respondent, the 1st Respondent referred to the Hansard which indicates that the First Reading of the Finance Bill 2018 took place on 2nd October, 2018 during the 2nd Respondent's Second Plenary Session. The bill was referred to the Finance Committee of the County Assembly. It is, therefore, submitted that the allegations by the Petitioners that the Finance Act, 2018 did not go through the First Reading is unfounded.

51. Submitting on the issue of *public participation*, the 1st Respondent stated that Article 196(b) of the Constitution requires County Assemblies to facilitate public participation and involvement in the legislation and other business of the Assemblies and their committees. County Assemblies, therefore, have a constitutional obligation to facilitate public participation on policy formulation, legislative process and any other decision affecting residents of the County.

52. It is further submitted that what constitutes public participation has generated considerable judicial debate but there appears to be consensus that: - "*What matters is that at the end of the day a reasonable opportunity is afforded to members of the public and any interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case.*" This was held in ***Commission for the Implementation of the Constitution -vs- Parliament of Kenya & Another (2013) eKLR*** where the Court dealt with the constitutionality of the Leadership and Integrity Act No. 19 of 2012 which had been challenged on the basis, among others, that there was no public participation in its enactment.

53. The 1st Respondent also referred to the South African case of *Doctors for Life International case* (supra) as well as *David Ngige Tharu and 128 Others vs. Principal Secretary, Ministry of Lands, Housing and Urban Development & 2 Others (2016) eKLR* and *British American Tobacco Ltd vs. Cabinet Secretary for the Ministry of Health & 5 others [2017] eKLR* on the issue of public participation.

54. The 1st Respondent also submitted that public participation is a continuous process and that there has been adequate public participation at all material times in respect to the making and passing of the Finance Act, 2018 into law. Members of the public and stakeholders were

invited to give their views on the amendments to the Nairobi County Finance Act, 2015. Due process was adhered to preceding passing of the Nairobi County Finance Bill, 2018 into law. The 2nd Respondent through its Clerk advertised at the county website under *submissions of memorandum and public participation* inviting the public to air their views on the 29th October, 2018 at Waitihaka Social Hall and further on 30th October, 2018 at Jericho Social Hall.

55. The 1st Respondent further submitted that the Petitioners were indeed among the members of the public who were duly invited by the 2nd Respondent to submit their views on the 2nd Respondent's 2018-2019 budget estimates at the stakeholder's fora of 29th and 30th October 2018. If they failed to submit those views, then they cannot be heard now to blame the Respondents for their own failure to utilize the opportunity duly and lawfully presented to them.

56. It is the 1st Respondent's further submission that the impugned Finance Act, 2018 was in any event enacted by the duly elected representatives of the public in the Nairobi City County Assembly. It is also submitted that 1st Respondent actively involved the public in its budget making process for the financial year 2018/2019 right from the time of preparation of the budget estimates of revenue and expenditure to the time that the Finance Act 2018 was enacted into law. The 2nd Respondent, therefore, complied with the provisions of Articles 10, 174(c) and 196(b) of the Constitution on public participation in governance of counties and in legislative making process, contrary to the unfounded allegations of the Petitioners.

57. Furthermore, the 1st Respondent submitted that timely access to information is one of the tenets upon which public participation is anchored. The 2nd Respondent cognizant of this posted the amended Finance Bill on the 2nd Respondent's website, which could be downloaded, for ease of access by the public and interested persons in compliance with Article 35 of the Constitution and the Access to Information Act, 2016.

58. Finally, the 1st Respondent submitted that the burden of proving lack of public participation lies with the Petitioners who allege the same and that the Petitioners failed to discharge the burden. The decision in ***Law Society of Kenya v Attorney General & 2 others [2019] eKLR*** was referred to in buttressing the position.

59. On the constitutionality of Clause 17 Schedule 2.3 of the Finance Act, 2018 and the claim that the increase in licence fees for private vehicle parking service providers is arbitrary, unreasonable, harsh, unbearable and excessive, the 1st Respondent submitted that it is not for this Honourable Court to decide whether Clause 17 Schedule 2.3 of the Finance Act, 2018 is appropriate or fitting. That discretion is left solely to the Legislative body which in this case is the County Assembly. Reliance was placed on *Tata Chemicals Magadi Limited vs. County Government of Kajiado & 2 others* case supra.

60. The 1st Respondent further submitted that the power of a County Assembly to levy taxes was also reinforced in ***Base Titanium Limited vs. The County Government of Mombasa & another [2017] eKLR*** and in ***County Government of Kwale v Kenya Airports Authority [2017] eKLR***.

61. It is submitted that the Petitioners have not demonstrated how the said provision is prejudicial to the national economic policy. They have only stated that it adversely affects the national economic policy of fostering and encouraging local industries with no evidence of how it has done so. Consequently, the said provision cannot be deemed by this Honourable court to be unconstitutional as there is conclusive evidence as to how it has affected the national economic policy.

62. On the aspect of discrimination, the 1st Respondent relied on ***John Kabui Mwai & 3 Others vs. Kenya National Examination Council & 2 Others [2011] eKLR*** where the Court cited with approval the case of *Willis vs. The United Kingdom, No. 36042/97, ECHR 2002 - IV and Okisz vs. German No. 59140 00 25th October 2005*, where the European Court of Human Rights observed that discrimination means treating differently, without any objective and reasonable justification, persons in relevantly similar situations. The case of ***Mohamed Fugicha v Methodist Church in Kenya (suing through its registered trustees) & 3 others [2016] eKLR*** was also referred to.

63. The 1st Respondent submitted further that 2nd Respondent in passing the said provision gave sufficient reason as to why there was an increase in licence rates for the Petitioners and other private parking service providers thus negating the Petitioners' claim that such increase was arbitrary and hence discriminatory. Under the Hansard of 4th December 2014, during the deliberations on the Amendments of the Finance Bill 2018, the Committee was informed on a number of enterprises who had been granted single business permits for shops and structured buildings but had gone ahead to engage in the parking business. To ensure that the concerns are captured in the county's resource framework, the Committee proceeded to revise single business permits for malls, complexes and other business running parking bays in the City who have engaged in parking business. The Assembly thereby proceeded to charge malls operating parking. As such, there was no discrimination.

64. The Petitioners also contended that their legitimate expectation was violated. On this, the 1st Respondent submitted that the Petitioners failed to tender evidence to show that there were any negotiations between them and the Respondents with regards to the impugned provision of the Finance Act, 2018. As such they lack a basis to expect the 1st Respondent to suspend the implementation of the impugned provision of the Act.

65. Furthermore, and without prejudice to the foregoing, the 1st Respondent submitted that legitimate expectation is based on legitimate representation made by an authority which has power to make such representation that certain actions will be done in a particular way without any qualification. Such representation gives rise to legitimate expectation and the authority or institution is thus bound by that representation. The principle was discussed in ***Jane Kiongo & 15 others v Laikipia University & 6 others [2019] eKLR*** where the Court cited with approval the decision in *National Director of Public Prosecutions v Phillips and Others. [2002] (4) SA 60 (W)* para 28, where Hehe J, stated that: -

The law does not protect every expectation but only those which are 'legitimate'. The requirements for legitimacy of the expectation include the following:

(i) The representation underlying the expectation must be 'clear, unambiguous and devoid of relevant qualification';

(ii) The expectation must be reasonable;

(iii) The representation must have been induced by the decision-maker;

(iv) The representation must be one which it was competent and lawful for the decision-maker to make without which the reliance cannot be legitimate.

66. It is submitted that there cannot be a legitimate expectation when the same goes against the law. There exists no provision under the PFM Act, the Constitution or the County Governments Act or any other statute that provides for negotiation of expressly provided rates within a duly legislated Act.

67. The 1st Respondent also submitted that the Petitioners had failed to lay any basis for the grant of any injunctive reliefs. It made reference to the decisions in *Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR*, *Giella v Cassman Brown Co. Ltd 1973 E.A. 358* and *Mrao Ltd. V. First American Bank of Kenya Ltd & 2 others [2003] eKLR*.

68. In the end, the 1st Respondent called upon this Court to disallow the Petition with costs to itself.

69. In opposing the Petition, the 2nd Respondent pleaded that as a legislative arm of the County Government, it has power to formulate laws that regulate the conduct and activities within the County and to also provide oversight. Further, under Article 175(b) of the Constitution, the 2nd Respondent is empowered to have reliable sources of revenue to enable it govern and deliver services effectively. And, Article 209(4) of the Constitution empowers a County Government to impose the levy and other charges applicable at the county level.

70. In passing the Finance Act, 2018 the 2nd Respondent averred that it carried out adequate participation. It stated that members of the public and stakeholders, including the Petitioners, were invited to give their views on the amendments to the Nairobi County Finance Act, 2015. Due process was adhered to preceding passing of the Nairobi County Finance Bill, 2018 into law. The 2nd Respondent through its Clerk advertised at the county website under submissions of memorandum and public participation inviting the public to air their views on the 29th October, 2018 at Waithaka Social Hall and further on 30th October, 2018 at Jericho Social Hall.

71. On the extension of time to pass the Finance Act, 2018, the 2nd Respondent pleaded that it relied on Section 90 of the PFM Act which empowers it to extend time. The 2nd Respondent also pleaded that the Bill was procedurally passed and that it fully complied with the law. The statute now enjoys the presumption of legality.

72. On the increase of the levies, the 2nd Respondent pleaded that the County Government's budgetary estimates rose from Kshs. 30 Billion in 2015 to over Kshs. 33 Billion in 2018 hence the need to raise more revenue. The increase was, hence, necessary and reasonable noting that the levy is annual.

73. The 2nd Respondent also pleaded that the Petitioners had failed to demonstrate that injunctive orders ought to issue.

74. In making its submissions on public participation, the 2nd Respondent reiterated its position that there as adequate public participation before the Finance Act, 2018 was passed into law. That, it carried out two public meetings and collected views as copies of the Bill could be easily downloaded from the website. The decisions in *Minister of Health vs. New Clicks South Africa (Pty) Ltd, Doctor's for Life International v The Speaker National Assembly and Others (CCT 12/05) 2006 ZACC II* and *Nairobi Metropolitan PSV Saccos Union Ltd & 25 Others v County of Nairobi Government & 3 Others Petition No. 486 of 2013* were relied on to buttress that public participation was duly carried out and that it was not a must that all the views tendered be adopted.

75. In contending that the 2nd Respondent has power to extend the time within which to pass the Finance Act, 2018 the 2nd Respondents admitted that the Appropriation Bill having been passed by the Assembly on 27th June, 2018 then the Finance Bill was to be passed not later than the 27th September, 2018. However, it contends that, due to the technicalities of the Bill, the finalization of the drafting of the amendment Bill took long resulting in late submission for the consideration. The 2nd Respondent sought reliance on Section 90 of the PFM Act to extend the time.

76. On the Petitioners' submission that Section 90 of the PFM Act cannot be relied on by the 2nd Respondent since the 2nd Respondent is not a House of Parliament, the 2nd Respondent submitted that indeed the section can be relied on by the Assembly since it has been delegated with legislative power at the county level, the power is provided under Article 1 of the Constitution. Furthermore, the section does not directly exclude the County Assembly from relying on it from the proceedings of the assemblies.

77. As to whether the license fee for parking services is hefty, unfair and discriminatory against the Petitioners, the 2nd Respondent urged this Court to note that the 2nd Respondent is the legislative arm of the County Government responsible for the formulation of laws that regulate the conduct and activities within the County and provide oversight. That, the 2nd Respondent has made efforts to give effect to devolution and the instant Petition is only intended to defeat the exercise of the 1st Respondent's constitutional mandate by claiming that the fees charged are hefty which argument is contrary to Article 175 of the Constitution.

78. The 2nd Respondent further submitted that the Appropriation Act 2018 whose purpose is to authorize the issue of a sum of money out of the County Revenue Fund and its application towards the service of the year ending on 30th June 2018 appropriated the sums for the financial year 2018-19 to Kshs. 33,649,692,138 from that appropriated in the 2015 Appropriation Act which was Kshs. 30,828,694,489. The County then needed more fund to run the county's businesses subject to the provisions of Article 209(4) of the Constitution 2010. The Petitioners, it is submitted, have not indicated in any way how the action on ensuring that the amounts required by the county through increasing the parking licenses are achieved prejudices national economic policies, when in actual the Respondent are indeed ensuring that national economic policies are achieved.

79. The Petitioners claim that the amounts charged as license fees is punitive or unfair and discriminatory and that they were unfairly targeted with a view of rendering them out of business. According to the 2nd Respondent, the Hansard of 4th December 2014, during the deliberations on the Amendments of the Finance Bill 2018, the Committee was informed on a number of enterprises who had been granted single business permits for shops and structured buildings but had gone ahead to engage in the parking business. To ensure that the concerns are captured in the county's resource framework, the Committee proceeded to revise single business permits for malls, complexes and other business running parking bays in the City who have engaged in parking business.

80. The Assembly, further submitted that, it proceeded to charge a levy on the malls operating parking with capacity of more than 100 vehicles at Kshs. 500,000 annually. The assembly also proceeded to net into the transport network companies like Uber, Taxify, Little Cabs and others by imposing on them an annual single business permit of Kshs. 300,000. The fees are reasonable, fair and cuts across all like service providers. For instance, the fees reserved for parking for all PSV is Kshs. 250,000/- per annum, loading zone for private vehicle is Kshs. 600,000/- and for the medium Private vehicle is Kshs 300,000/-. The reasonable increase should not at all be considered as punitive against the Petitioners but a way of the 2nd Respondent to ensure the safe running of the County Government and that the services offered by the County are accounted for.

81. Urging this Court to further find that the charges are not discriminatory, the Court was urged not to consider mere difference of the license charges on particular sector to amount to arbitrariness. It is indeed generally impossible to regulate affairs of people without differentiation. The categorization of large private vehicles parking being charged at 500,000/- must not be deemed as discrimination without a cautious further interrogation. The discrimination as provided by the Petitioners is not on any grounds specified under Article 27(4) of the Constitution. For purposes of the interrogation, the test to help establish discrimination should truly be as was laid down in the case of **Harksen –v- Lane NO [1998] 1 SA 300** which was relied upon in *Masai Mara (SOPA) Limited v Narok County Government [2016] eKLR* where the Court stated as follows: -

[47] The question whether there has been differentiation on a specified or an unspecified ground must be answered objectively. In the former case the enquiry is directed at determining whether the statutory provision amounts to differentiation on one of the grounds specified... Similarly, in the latter case the enquiry is whether the differentiation in the provision is on an unspecified ground... If in either case the enquiry leads to a negative conclusion then Section 8 (2) has not been breached and the question falls away. If the answer is in the affirmative, however, then it is necessary to proceed to the second stage of the analysis and determine whether the discrimination is "unfair". In the case of discrimination on a specified ground, the unfairness of the discrimination is presumed, but the contrary may still be established. In the case of discrimination on an unspecified ground, unfairness must still be established before it can be found that a breach of section 8(2) has occurred.

82. The Court in *Masai Mara (SOPA) Limited* case (supra) went further to state that in applying the test to Kenya the question is firstly whether the differentiation amounts to discrimination. If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination depends on whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

83. In the Petition herein, the 2nd Respondent contends that the Petitioners have not based the discrimination on any of the grounds as provided for under article 27(4) of the Constitution. The 2nd Respondent then submitted that, the failure of the Petitioners to specify on what ground they claim to be discriminated on then means that there was indeed no discrimination. As such, unfairness cannot be presumed in the circumstances.

84. On a without prejudice to the foregoing, the 2nd Respondent submitted that if the alleged discrimination is on an unspecified ground then the complainant has to establish the unfairness, and the test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. Indeed, the burden imposed on the Petitioners is the same burden imposed on any person who wishes to get any services from the County Assembly noting that the money is needed for the county to run its day to day business.

85. On the contention by the Petitioners that the eventual parking fees stipulated under Clause 17 of the Finance Act, 2018 is oppressive, it is submitted that the parking fees cannot be said to be oppressive within the meaning of article 209(5) of the Constitution, since the expenditure revenue that the Respondent seeks to collect was justified to the public by the 1st Respondent's Executive Committee. The Petitioners have indeed failed to demonstrate how parking fees would prejudice national economic policies and economic activities across County boundaries or national mobility of goods and services, capital or labour as to legitimately contend that the Schedule violates the provisions of Article 209(5) of the Constitution. It is further submitted that the budget making process is governed by the Constitution and the provisions of Sections 125, 129, 130, 131, 132 and 133 of the PFM Act. And, in accordance with these provisions, the 1st Respondent's Executive Committee for Finance prepared the 2018/2019 budget estimates of revenue and expenditure which were duly approved by the 1st Respondent's Executive Committee which then submitted the budget estimates to the Nairobi City County Assembly for consideration and the same were duly approved. Thereafter, the Nairobi City County Assembly enacted the requisite appropriation laws, including the Appropriation Act, 2018 and the Finance Act 2018 required to implement the 1st Respondent's budget which was thereby conducted.

86. The 2nd Respondent submits that there is a general presumption that statutes enacted by Parliament and in this case, a County Assembly, are constitutional and the burden falls upon the person who alleges otherwise to rebut this presumption.

87. Further, the 2nd Respondent urged this Court not to direct the 1st Respondent on how to exercise its duty of levying parking fees. The 2nd Respondent has the option of legislating on the parking fees and in its wisdom, it did so having taken into consideration public views, its policies as well as the revenue it ought to raise. The Petitioners have failed to demonstrate how the levying of parking fees in the manner proposed by the Respondents has prejudiced national economic policies, economic activities across the County, mobility of goods, services, capital and labour. It was vehemently submitted that it is not enough for the Petitioners to state that the amounts levied by the 2nd Respondent are excessively high. They have a duty to demonstrate how that will affect the national economic policies and they have failed to do so.

88. Having so submitted, the 2nd Respondent prayed that the Petition be dismissed with costs to the 2nd Respondent.

Issues for Determination:

89. Having considered the respective parties' pleadings, arguments and counter arguments and the decisions variously referred to by the parties, I discern the following issues for determination: -

(i) *Whether the 2nd Respondent could rely on Section 90 of the PFM Act in extending the time provided for under Section 133 of the PFM Act within which to pass the Finance Act, 2018;*

(ii) *Whether county legislation must be published in the Kenya Gazette and in the County Gazette for legitimacy;*

(iii) *Whether the Finance Act, 2018 is in violation of the Constitution and the law for want of public participation, stakeholder consultations and administratively fair procedures;*

(iv) *Whether the impugned increase of the fees and levies discriminated against the Petitioners.*

90. As this matter centres on how the Constitution and statutes ought to be generally interpreted, I will, before dealing with the above issues, first, look at the manner in which the Constitution and the statutes ought to be interpreted.

91. This Court dealt with this subject recently in **Nairobi High Court Constitutional Petitions No. 33 and 42 of 2018 (Consolidated) Okiya Omtatah Okoiti vs. Public Service Commission & 73 Others** (unreported). The Court rendered itself as follows: -

54. *As regards the interpretation of the Constitution, suffice to say that the Constitution itself gives guidelines on how it ought to be interpreted. That is in Articles 20(4) and 259(1).*

55. *Article 20(4) requires Courts while interpreting the Bill of Rights to promote the values that underlie an open and democratic society based on human dignity, equality, equity and freedom and the spirit, purport and the objects of the Bill of Rights. Article 259(1) command Courts to interpret the Constitution in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights, permits the development of the law and contributes to good governance.*

56. *Courts have also rendered how the Constitution ought to be interpreted. The Supreme Court in a ruling rendered on 21st December, 2011 in **In the Matter of Interim Independent Electoral Commission [2011] eKLR** discussed the need for Courts, while interpreting the Constitution, to favour a purposive approach as opposed to formalism. The Court stated as under: -*

[86] *.... The rules of constitutional interpretation do not favour formalistic or positivistic approaches (Articles 20(4) and 259(1)). The Constitution has incorporated non-legal considerations, which we must take into account, in exercising our jurisdiction. The Constitution has a most modern Bill of Rights, that envisions a human-rights based, and social-justice oriented State and society. The values and principles articulated in the Preamble, in Article 10, in Chapter 6, and in various other provisions, reflect historical, economic, social, cultural and political realities and aspirations that are critical in building a robust, patriotic and indigenous jurisprudence for Kenya. Article 159(1) states that judicial authority is derived from the people. That authority must be reflected in the decisions made by the Courts.*

[87] *In Article 259(1) the Constitution lays down the rule of interpretation as follows: "This Constitution shall be interpreted in a manner that – (a) promotes its purposes, values and principles; (b) advances the rule of law, and human rights and fundamental freedoms in the Bill of Rights; (c) permits the development of the law; and (d) contributes to good governance." Article 20 requires the Courts, in interpreting the Bill of Rights, to promote: (a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and (b) the spirit, purport and objects of the Bill of Rights.*

[88] *..... Article 10 states clearly the values and principles of the Constitution, and these include: patriotism, national unity, sharing and devolution of power, the rule of law, democracy, participation of the people, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized, good governance, integrity, transparency and accountability, and sustainable development.*

[89] *It is for these reasons that the Supreme Court, while observing the importance of certainty of the law, has to nurture the development of the law in a manner that eschews formalism, in favour of the purposive approach. Interpreting the Constitution, is a task distinct from interpreting the ordinary law. The very style of the Constitution compels a broad and flexible approach to interpretation.*

57. *On the principle of holistic interpretation of the Constitution, the Supreme Court in **Communications Commission of Kenya & 5***

others v Royal Media Services Limited & 5 others [2015] eKLR affirmed the holistic interpretation principle by stating that:

This Court has in the past set out guidelines for such matters of interpretation. Of particular relevance in this regard, is our observation that the Constitution should be interpreted in a holistic manner, within its context, and in its spirit.

58. The meaning of holistic interpretation of the Constitution was addressed by the Supreme Court in *In the Matter of the Kenya National Human Rights Commission*, Sup. Ct. Advisory Opinion Reference No. 1 of 2012; [2014] eKLR. The Court at paragraph 26 stated as follows: -

...But what is meant by a holistic interpretation of the Constitution? It must mean interpreting the Constitution in context. It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result.

59. In a Ugandan case in *Tinyefuza v Attorney General*, [1997] UGCC 3 (25 April 1997) the Court was of the firm position that the Constitution should be read as an integrated whole. The Court observed as follows: -

... the entire Constitution has to be read as an integrated whole, and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, the rule of completeness and exhaustiveness and the rule of paramourcy of the written Constitution....

60. In *Centre for Rights Education and Awareness & another v John Harun Mwau & 6 others [2012] eKLR*, the Court of Appeal summarized the various principles of constitutional interpretation as follows:

[21] ... Before the High Court embarked on the interpretation of the contentious provisions of the Constitution, it restated the relevant principles of interpretation of the Constitution as extracted from case law thus: -

- that as provided by Article 259 the Constitution should be interpreted in a manner that promotes its purposes, values and principles; advances rule of law, human rights and fundamental freedoms and permits development of the law and contributes to good governance.
- that the spirit and tenor of the Constitution must preside and permeate the process of judicial interpretation and judicial discretion.
- that the Constitution must be interpreted broadly, liberally and purposively so as to avoid “the austerity of tabulated legalism.
- that the entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other as to effectuate the great purpose of the instrument (the harmonization principle).

These principles are not new. They also apply to the construction of statutes. There are other important principles which apply to the construction of statutes which, in my view, also apply to the construction of a Constitution such as presumption against absurdity – meaning that a court should avoid a construction that produces an absurd result; the presumption against unworkable or impracticable result - meaning that a court should find against a construction which produces unworkable or impracticable result; presumption against anomalous or illogical result, - meaning that a court should find against a construction that creates an anomaly or otherwise produces an irrational or illogical result and the presumption against artificial result – meaning that a court should find against a construction that produces artificial result and, lastly, the principle that the law should serve public interest – meaning that the court should strive to avoid adopting a construction which is in any way adverse to public interest, economic, social and political or otherwise. Lastly, although the question of the election date of the first elections has evoked overwhelming public opinion, public opinion as the High Court correctly appreciated, has minimal role to play. The court as an independent arbiter of the Constitution has fidelity to the Constitution and has to be guided by the letter and spirit of the Constitution.

92. In *Advisory Opinion Application No. 2 of 2012, In the Matter of the Principle of Gender Representation in the National Assembly and the Senate [2012] eKLR*, the Supreme Court spoke to purposive interpretation of the Constitution. It had the following to say: -

...The approach is to be purposive, promoting the dreams and aspirations of the Kenyan people, and yet not in such a manner as to stray from the letter of the Constitution.

93. The Court went ahead and gave further meaning of the term *purposive* by making reference to the decision in the Supreme Court of Canada in *R -vs- Drug Mart* (1985) when it made the following remarks: -

The proper approach to the definition of the rights and freedoms guaranteed by the Charter was a purposive one. The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect...to recall the Charter was not enacted in a vacuum, and must therefore... be placed in its proper linguistic, philosophic and historical contexts.

94. The Supreme Court, while referring to the South African Constitutional decision in *Minister of Home Affairs (Bermuda) v Fisher [1980] AC 319 (PC)*, went further and stated that a purposive approach is ‘a generous interpretation... suitable to give individuals the full measure of the fundamental rights and freedoms referred to.’

95. The Learned Judges of the Supreme Court further agreed with the South African Constitutional Court in *S -vs- Zuma (CCT5/94) 1995* when it stated that in taking a purposive approach in interpretation, regard must be paid to the legal history, traditions and usages of the country concerned.

96. The Supreme Court embellished the need to pay attention to legal history while interpreting not only the Constitution but also statutes. It observed as follows: -

8.11 This background is, in my opinion, a sufficient statement on the approach to be taken in interpreting the Constitution, so as to breathe life into all its provisions. It is an approach that should be adopted in interpreting statutes and all decided cases that are to be followed, distinguished and for the purposes of the Supreme Court when it reverses itself.

97. The Court of Appeal while dealing with holistic interpretation of the Constitution in *Civil Appeal 74 & 82 of 2012, Centre for Rights Education and Awareness & Another v John Harun Mwau & 6 others [2012] eKLR* stated that the entire Constitution must be read as an integrated whole and no one particular provision destroying the other so as to effectuate harmonization principle.

98. I will now deal with the substantive issues as framed.

(i) Whether the 2nd Respondent could rely on Section 90 of the PFM Act in extending the time provided for under Section 133 of the PFM Act within which to pass the Finance Act, 2018:

99. The respective parties’ cases and submissions on this issue have been well captured above. I will not, therefore, reproduce the same herein.

100. The reigning contention is whether Section 90 of the PFM Act is available to County Assemblies in extending the time of 90 days set under Section 133 of the PFM Act [since Section 90 of the PFM Act applies to the Houses of Parliament] within which Finance Bills ought to be passed into law after the enactment of the Appropriation Acts.

101. The issue of extension of timelines has been adequately addressed by Courts. The starting point is always the Constitution or the statute or the document itself. If the Constitution or the statute or the document provides for extension of time, then the matter ends there. An issue only arises in the event the Constitution, the statute and the document are silent on extension of time. In such a case, a Court will be called upon to give an interpretation and subsequent application of the law.

102. The Supreme Court has dealt with the issue as to whether the timelines set in the Constitution can be extended. That was in *Civil Application No. 6 of 2014 George Mike Wanjohi -vs- Steven Kariuki & 2 others [2014] eKLR*. In the case, the Court was confronted with the question as to whether it could stop the constitutionally triggered timeline under Article 101(4) of the Constitution which made it a requirement that a by-election shall be held within 90 days of the occurrence of a vacancy in the office of a member of National Assembly elected under Article 97(1)(a) or (b) or of the Senate elected under Article 98(a). In making the finding that constitutional timelines must be kept sacred, the Learned Judges made the following finding: -

[45] Consequently, any statutory process or act done ultra vires the provisions of the Constitution, this Court will not hesitate to declare them void. Hence, a stay order will not be tantamount to stopping a constitutional process. We hasten to add that what the Court cannot do is to extend the 90 days’ period within which the election should be held. That period is sacred as it is provided for in the Constitution and even this Court, a creature of the Constitution, cannot extend it.

103. There has been divided judicial opinion as to whether a Court can extend time set by a statute where the statute is silent on the extension. Whereas I will not, in this judgment, venture into this discussion for the reason that the issue was not among the main ones canvassed by the parties, suffice to say that any application and construction of a statute must at all times bear the necessary constitutional imperatives since all statutes are subordinate to the Constitution.

104. Having said so, I will now revert to the issue at hand and refer to the provisions of the County Governments Act, No. 17 of 2012.

105. **Section 8** of the County Governments Act provides for the role of a County Assembly in the following manner: -

(1) The county assembly shall—

(a) vet and approve nominees for appointment to county public offices as may be provided for in this Act or any other law;

(b) perform the roles set out under Article 185 of the Constitution;

(c) approve the budget and expenditure of the county government in accordance with Article 207 of the Constitution, and the legislation contemplated in Article 220(2) of the Constitution, guided by Articles 201 and 203 of the Constitution;

(d) approve the borrowing by the county government in accordance with Article 212 of the Constitution;

(e) approve county development planning; and

(f) perform any other role as may be set out under the Constitution or legislation.

(2) If a county assembly fails to enact any particular legislation required to give further effect to any provision of this Act, a corresponding national legislation, if any, shall with necessary modifications apply to the matter in question until the county assembly enacts the required legislation

106. Section 8(1)(c) of the County Governments Act specifically provides for approval of the budgets and expenditure of a county government in accordance with, *inter alia*, the provisions of Article 220(2) of the Constitution.

107. **Article 220(2)** of the Constitution provides as follows: -

(2) National legislation shall prescribe—

(a) the structure of the development plans and budgets of counties;

(b) when the plans and budgets of the counties shall be tabled in the county assemblies; and

(c) the form and manner of consultation between the national government and county governments in the process of preparing plans and budgets.

108. Article 220(2)(b) of the Constitution is categorical that it is the national legislation which will prescribe ‘*when the plans and budgets of the counties shall be tabled in the county assemblies.*’ The legislation contemplated under Article 220(2) of the Constitution is the PFM Act.

109. Deriving from the foregoing, suffice to say that the PFM Act is the sole legislation which determines ‘*when the plans and budgets of the counties shall be tabled in the county assemblies.*’

110. **Section 133** of the PFM Act provides for the time within which a Finance Bill ought to be passed into law by a County Assembly. The provision states as follows: -

Not later than ninety days after passing the Appropriation Bill, the County assembly shall consider and approve the Finance Bill with or without amendments.

111. Further, the PFM Act provides for extension of time in **Section 90** as follows: -

Any House of Parliament may, by resolution, extend the time limit, other than a time limit set in the Constitution, for submitting a statement or other document required to be submitted to it under this Act.

112. **Article 93(1)** of the Constitution provides for the establishment of the Parliament of Kenya. The Parliament is comprised of the National Assembly and the Senate.

113. As said, it is the Petitioners’ contention that Section 90 of the PFM Act is not applicable to Section 133 of the PFM Act since a County Assembly is not a House of Parliament.

114. In order to deal with the said contention, there is need to look at the totality of the PFM Act. **Four crucial points** come to the fore. The **first** point is that the PFM Act contemplates instances where the Appropriation Bill may be passed into law beyond the 30th June deadline.

115. Section 131 of the PFM Act provides that the Appropriation Bill must be passed into law by the 30th June in each year. However, **Section 134** of the PFM Act provides for instances where the Appropriation law is not in place passed the 30th June. The section states as follows: -

(1) Subject to subsection (2), if the County Appropriation Bill for a financial year has not been assented to, or is not likely to be assented to by the beginning of that financial year, a county assembly may authorise the withdrawal of money from the County Revenue Fund.

(2) Money withdrawn under subsection (1) —

(a) may be used only for the purpose of meeting expenditure necessary to carry on the services of the county government during the financial year concerned until such time as the relevant appropriation law is passed; and

(b) may not exceed, in total, one-half of the amount included in the estimates of expenditure submitted to the county assembly for that year.

(3) *The Speaker of the county assembly shall, within seven days, communicate the authorization in subsection (1) to the County Executive Committee member for finance.*

(4) *The money withdrawn under subsection (1) shall be included in the appropriation law, under separate votes, for the services for which it is withdrawn.*

116. In enacting Section 134 of the PFM Act, Parliament was aware that there could be instances where the Appropriation Bill may not be enacted into law by 30th June. Parliament, therefore, made provisions for such eventualities and in realization of the fact that an Appropriation Bill could, as well, be passed into law well after 30th June.

117. The **second** point is that a Finance Act is one of the laws required to implement the budget and it can only be passed after the enactment of the Appropriation Bill into an Act. Section 133 of the PFM Act provides for a period of 90 days within which the Finance Bill ought to be enacted into law. Deriving from the first point, if the Appropriation Act can be enacted after the 30th June deadline and the Finance Act can only be passed into law after the enactment of the Appropriation Bill into law, then it flows that the period within which the Finance Bill may be enacted into law can also be extended.

118. The **third** point is that unless it is on the basis of permissible differentiation, there can be no basis for allowing extension of time in the Houses of Parliament and in passing of the Appropriation Bill in the County Assemblies, but decline extension of time to pass the Finance Bills in the County Assemblies.

119. The **fourth** point is the fact that without the enactment of *inter alia* the Appropriation Act and the Finance Act, there will be difficulties in assessing the public funds and that will curtail service provision. In fact, the net effect will be that any County government which will not be able to pass the Appropriation Bill and the Finance Bill into law as provided for within the time set in the PFM Act, **regardless of the reasons**, will not be able to in any way function. Allowing such to happen will be counter-productive to devolution. Indeed, it is in public interest that Courts must take deliberate steps in nurturing devolution.

120. From the above discussion and in applying the principles of interpretation of statutes on the presumption against absurdity, the presumption against unworkable or impracticable result, presumption against anomalous or illogical result, the presumption against artificial result and the principle that the law should serve public interest, I find and hold that Section 90 of the PFM Act should, as well, apply *mutatis mutandis* to all the businesses before County Assemblies.

121. In this case, therefore, the 2nd Respondent was within the law in relying on Section 90 of the PFM Act to extend the time within which the Finance Bill, 2018 was passed into law.

122. The first issue is, hence, answered in the affirmative.

(ii) Whether county legislation must be published in the Kenya Gazette and in the County Gazette for legitimacy:

123. The High Court in **James Gacheru Kariuki & 3 others v Attorney General & 11 others [2017] eKLR** dealt with the issue at length. I have carefully read the said decision and I fully and wholly agree with the analysis and findings. The Court distinguished publication of legislation in the Kenya Gazette and in the County Gazette. The Court rendered itself as follows: -

27. *I shall begin my analysis on this issue by making reference to **Article 199(1) of the Constitution** which provides as follows;*

County legislation does not take effect unless published in the Gazette.

28. *Article 260 goes ahead to define a ‘Gazette’ as;*

the Kenya Gazette published by authority of the National Government or a supplement to the Kenya Gazette.

29. Thus, **Article 199(1)** may equally be read as, “County legislation does not take effect unless published in the Kenya Gazette or a supplement to the Kenya Gazette.”

30. *It is also not in doubt that **Article 199(1) of the Constitution** imposes a mandatory obligation for publication of all County legislations in the Kenya Gazette or a supplement to the Kenya Gazette and it is only through such publication that a county legislation can gain legitimacy. What therefore is a County Gazette, if at all and is there any relationship between a County Gazette and the Kenya Gazette?*

31. *The term ‘County Gazette’ is not defined nor provided for in the **Constitution** which only provides for a Gazette, which has been defined as the Kenya Gazette published by the authority of the National Government or a supplement to the Kenya Gazette. However, the **County Governments Act** defines a ‘County Gazette’ as a Gazette published by the authority of the County Government or a supplement of such a Gazette. This shows that there is a clear distinction between a ‘County Gazette’ and a ‘Kenya Gazette’ and the difference as can be seen above is; whereas the ‘Kenya Gazette’ is published under the authority of the National Government, the ‘County Gazette’ is published under the authority of a County Government.*

32. *In essence, while the concept of a ‘County Gazette’ was introduced by the **County Governments Act**, the **Constitution** explicitly requires County legislation to be published in the Kenya Gazette for them to take effect. I so find.*

124. Standing Order 127 states as follows: -

No Bill shall be introduced unless such Bill together with the memorandum referred to in Standing Order 124 (Memorandum of objects and reasons), has been published in the County Gazette and the Kenya Gazette (as a Bill to be originated in the County Assembly), and unless, in the case of a County Revenue Fund Bill, an Appropriation Bill or a Supplementary Appropriation Bill, a period of seven days, and in the case of any other Bill a period of fourteen days, beginning in each case from the day of such publication, or such shorter period as the County Assembly may resolve with respect to the Bill, has ended.

125. There is no doubt that the Finance Bill, 2018 was not published in either the Kenya Gazette or the County Gazette. As a result, the legislation cannot legally stand.

126. The Petitioners also contended that in dealing with the Bill, only one stage may be conducted at the same sitting. *Standing Order 128(2)* settles the issue against the Petitioners as follows: -

(1) Except with the leave of the County Assembly, not more than one stage of a Bill may be taken at any one sitting.

(2) Paragraph (1) shall not apply to or in respect of an Appropriation Bill, a Supplementary Appropriation Bill, a Finance Bill or a County Revenue Amendment Bill.

127. In the end, whereas a county legislation cannot be valid except published in the Kenya Gazette, nevertheless a County Assembly has the power to reduce the period within which a Bill may be introduced into the Assembly upon publication in the Gazette and further a County Assembly may deal with more than one stage of an Appropriation Bill, a Supplementary Appropriation Bill, a Finance Bill or a County Revenue Amendment Bill at its single sitting.

(iii) Whether the Finance Act, 2018 is in violation of the Constitution and the law for want of public participation, stakeholder consultations and administratively fair procedures:

128. A robust discussion on public participation and consultation under Article 10 of the Constitution was recently made by a Five-Judge Bench in ***Mombasa Consolidated Constitutional Petition Nos. 159 of 2018 and 201 of 2019 William Odhiambo Ramogi & Others vs. The Attorney General & Others*** (unreported).

129. The analysis was as follows: -

115. The starting point is the Constitution. Article 2 inter alia declares the Constitution as the supreme law of the land which binds all persons and all State organs at both levels of government. It also provides that the validity or legality of the Constitution is not subject to any kind of challenge and that any law that is inconsistent with it is void to the extent of that inconsistency. Further, any act or omission in contravention of the Constitution is invalid. Article 3 places an obligation upon every person to respect, uphold and defend the Constitution.

116. Article 10 provides for the national values and principles of governance which bind all State organs, State officers, public officers and all persons whenever any of them applies or interprets the Constitution, enacts, applies or interprets any law or makes or implements any public policy decisions.

117. The Constitution also provided for alignment of the laws then in force at its promulgation. Section 7(1) of the Sixth Schedule states as follows: -

Any law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.

*118. Expounding on Article 10 of the Constitution, the Court of Appeal in **Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 Others, Civil Appeal No. 224 of 2017; [2017] eKLR** held that:*

In our view, analysis of the jurisprudence from the Supreme Court leads us to the clear conclusion that Article 10 (2) of the Constitution is justiciable and enforceable immediately. For avoidance of doubt, we find and hold that the values espoused in Article 10 (2) are neither aspirational nor progressive; they are immediate, enforceable and justiciable. The values are not directive principles. Kenyans did not promulgate the 2010 Constitution in order to have devolution, good governance, democracy, rule of law and participation of the people to be realized in a progressive manner in some time in the future; it could never have been the intention of Kenyans to have good governance, transparency and accountability to be realized and enforced gradually. Likewise, the values of human dignity, equity, social justice, inclusiveness and non-discrimination cannot be aspirational and incremental, but are justiciable and immediately enforceable. Our view on this matter is reinforced by Article 259(1) (a) which enjoins all persons to interpret the Constitution in a manner that promotes its values and principles.

Consequently, in this appeal, we make a firm determination that Article 10 (2) of the Constitution is justiciable and enforceable and violation of the Article can found a cause of action either on its own or in conjunction with other Constitutional Articles or Statutes as appropriate.

119. Courts have also dealt with the concepts of public participation and stakeholders' consultation or engagement. The High Court in **Robert N. Gakuru & Others vs. Governor Kiambu County & 3 Others [2014] eKLR** while referring to the South African decision in **Doctors for Life International vs. Speaker of the National Assembly & Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (cc); 2006(6) SA 416 (CC)** adopted the following definition of public participation: -

According to their plain and ordinary meaning, the words public involvement or public participation refers to the process by which the public participates in something. Facilitation of public involvement in the legislative process, therefore, means taking steps to ensure that the public participate in the legislative process.

120. Public participation therefore refers to the processes of engaging the public or a representative sector while developing laws and formulating policies that affect them. The processes may take different forms. At times it may include consultations. The **Black's Law Dictionary** 10th Edition defines 'consultation' as follows: -

The act of asking the advice or opinion of someone. A meeting in which parties consult or confer.

121. Consultation is, hence, a more robust and pointed approach towards involving a target group. It is often referred to as stakeholders' engagement. Speaking on consultation the Court of Appeal in **Legal Advice Centre & 2 others v County Government of Mombasa & 4 others [2018] eKLR** quoted with approval Ngcobo J in **Matatiele Municipality and Others vs. President of the Republic of South Africa and Others (2) (CCT73/05A) [2006] ZACC 12; 2007 (1) BCLR 47 (CC)** as follows: -

.....The more discrete and identifiable the potentially affected section of the population, and the more intense the possible effect on their interests, the more reasonable it would be to expect the legislature to be astute to ensure that the potentially affected section of the population is given a reasonable opportunity to have a say....

122. In a Three-Judge bench the High Court in consolidated **Constitutional Petition Nos. 305 of 2012, 34 of 2013 and 12 of 2014 (Formerly Nairobi Constitutional Petition 43 of 2014) Mui Coal Basin Local Community & 15 Others v Permanent Secretary Ministry of Energy & 17 Others [2015] eKLR** the Court addressed the concept of consultation in the following manner: -

... A public participation programme, must...show intentional inclusivity and diversity. Any clear and intentional attempts to keep out bona fide stakeholders would render the public participation programme ineffective and illegal by definition. In determining inclusivity in the design of a public participation regime, the government agency or Public Official must take into account the subsidiarity principle: those most affected by a policy, legislation or action must have a bigger say in that policy, legislation or action and their views must be more deliberately sought and taken into account.

(emphasis added)

123. Consultation or stakeholders' engagement tends to give more latitude to key sector stakeholders in a given field to take part in the process towards making laws or formulation of administrative decisions which to a large extent impact on them. That is because such key stakeholders are mostly affected by the law, policy or decision in a profound way. Therefore, in appropriate instances a Government agency or a public officer undertaking public participation may have to consider incorporating the aspect of consultation or stakeholders' engagement.

124. The importance of public participation cannot be gainsaid. The Court of Appeal in **Legal Advice Centre & 2 others v County Government of Mombasa & 4 others (supra)** while dealing with the aspect of public participation in lawmaking process stated as followed: -

The purpose of permitting public participation in the law-making process is to afford the public the opportunity to influence the decision of the law-makers. This requires the law-makers to consider the representations made and thereafter make an informed decision. Law-makers must provide opportunities for the public to be involved in meaningful ways, to listen to their concerns, values, and preferences, and to consider these in shaping their decisions and policies. Were it to be otherwise, the duty to facilitate public participation would have no meaning.

125. In **Matatiele Municipality v President of the Republic of South Africa (2) (CCT73/05A)**, the South African Constitutional Court stated as follows: -

A commitment to a right to...public participation in governmental decision-making is derived not only from the belief that we improve the accuracy of decisions when we allow people to present their side of the story, but also from our sense that participation is necessary to preserve human dignity and selfrespect...

126. The South African Constitutional Court in **Poverty Alleviation Network & Others v President of the Republic of South Africa & 19 others, CCT 86/08 [2010] ZACC 5** discussed the importance of public participation as follows: -

....engagement with the public is essential. Public participation informs the public of what is to be expected. It allows for the community to express concerns, fears and even to make demands. In any democratic state, participation is integral to its legitimacy. When a decision is made without consulting the public the result can never be an informed decision.

127. Facilitation of public participation is key in ensuring legitimacy of the law, decision or policy reached. On the threshold of public participation, the Court of Appeal in **Legal Advice Centre & 2 others v County Government of Mombasa & 4 others (supra)** referred to **Independent Electoral and Boundaries Commission (IEBC) vs. National Super Alliance (NASA) Kenya & 6 others**

[2017] eKLR stated as follows: -

the mechanism used to facilitate public participation namely, through meetings, press conferences, briefing of members of public, structures questionnaires as well as a department dedicated to receiving concerns on the project, was adequate in the circumstances. We find so taking into account that the 1st respondent has the discretion to choose the medium it deems fit as long as it ensures the widest reach to the members of public and/or interested party.

128. In **Mui Coal Basin Local Community & 15 Others v Permanent Secretary Ministry of Energy & 17 Others** (*supra*) the Court enumerated the following practical principles in ascertaining whether a reasonable threshold was reached in facilitating public participation: -

a) First, it is incumbent upon the government agency or public official involved to fashion a programme of public participation that accords with the nature of the subject matter. It is the government agency or Public Official who is to craft the modalities of public participation but in so doing the government agency or Public Official must take into account both the quantity and quality of the governed to participate in their own governance. Yet the government agency enjoys some considerable measure of discretion in fashioning those modalities.

b) Second, public participation calls for innovation and malleability depending on the nature of the subject matter, culture, logistical constraints, and so forth. In other words, no single regime or programme of public participation can be prescribed and the Courts will not use any litmus test to determine if public participation has been achieved or not. The only test the Courts use is one of effectiveness. A variety of mechanisms may be used to achieve public participation.

c) Third, whatever programme of public participation is fashioned, it must include access to and dissemination of relevant information. See **Republic vs The Attorney General & Another ex parte Hon. Francis Chachu Ganya (JR Misc. App. No. 374 of 2012)**. In relevant portion, the Court stated:

“Participation of the people necessarily requires that the information be availed to the members of the public whenever public policy decisions are intended and the public be afforded a forum in which they can adequately ventilate them.”

d) Fourth, public participation does not dictate that everyone must give their views on the issue at hand. To have such a standard would be to give a virtual veto power to each individual in the community to determine community collective affairs. A public participation programme, must, however, show intentional inclusivity and diversity. Any clear and intentional attempts to keep out bona fide stakeholders would render the public participation programme ineffective and illegal by definition. In determining inclusivity in the design of a public participation regime, the government agency or Public Official must take into account the subsidiarity principle: those most affected by a policy, legislation or action must have a bigger say in that policy, legislation or action and their views must be more deliberately sought and taken into account.

e) Fifth, the right of public participation does not guarantee that each individual’s views will be taken as controlling; the right is one to represent one’s views – not a duty of the agency to accept the view given as dispositive. However, there is a duty for the government agency or Public Official involved to take into consideration, in good faith, all the views received as part of public participation programme. The government agency or Public Official cannot merely be going through the motions or engaging in democratic theatre so as to tick the Constitutional box.

f) Sixthly, the right of public participation is not meant to usurp the technical or democratic role of the office holders but to cross-fertilize and enrich their views with the views of those who will be most affected by the decision or policy at hand.

130. Apart from Article 10, the Constitution further calls for public participation and consultation under Articles 174(c), 196(1)(b) and 201(a).

131. **Article 174** of the Constitution provides for the objects of devolution. One of those objects is the participation of the people. Article 174(c) provides as follows: -

(c) to give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them;

132. With reference to all aspects of financial matters, **Article 201** of the Constitution provides for the principles that guide public finance. Article 201(a) states that: -

(a) there shall be openness and accountability, including public participation in financial matters;

133. The Constitution further commands County Assemblies to specifically undertake public participation in their legislative and other businesses. **Article 196(1)(b)** of the Constitution provides as follows: -

(b) facilitate public participation and involvement in the legislative and other business of the assembly and its committees.

134. Further to the foregoing provisions, the County Governments Act also provides for citizen and public participation. **Section 87** provides for, and in mandatory terms, the principles guiding citizen participation. The provision states thus: -

Citizen participation in county governments shall be based upon the following principles—

- (a) timely access to information, data, documents, and other information relevant or related to policy formulation and implementation;*
- (b) reasonable access to the process of formulating and implementing policies, laws, and regulations, including the approval of development proposals, projects and budgets, the granting of permits and the establishment of specific performance standards;*
- (c) protection and promotion of the interest and rights of minorities, marginalized groups and communities and their access to relevant information;*
- (d) legal standing to interested or affected persons, organizations, and where pertinent, communities, to appeal from or, review decisions, or redress grievances, with particular emphasis on persons and traditionally marginalized communities, including women, the youth, and disadvantaged communities;*
- (e) reasonable balance in the roles and obligations of county governments and non-state actors in decision-making processes to promote shared responsibility and partnership, and to provide complementary authority and oversight;*
- (f) promotion of public-private partnerships, such as joint committees, technical teams, and citizen commissions, to encourage direct dialogue and concerted action on sustainable development; and*
- (g) recognition and promotion of the reciprocal roles of non-state actors' participation and governmental facilitation and oversight.*

In respect to the planning processes within the counties, Section 115 provides, mandatorily so, as follows: -

(1) Public participation in the county planning processes shall be mandatory and be facilitated through—

- (a) mechanisms provided for in Part VIII of this Act; and*
- (b) provision to the public of clear and unambiguous information on any matter under consideration in the planning process, including—*
 - (i) clear strategic environmental assessments;*
 - (ii) clear environmental impact assessment reports;*
 - (iii) expected development outcomes; and*
 - (iv) development options and their cost implications.*

(2) Each county assembly shall develop laws and regulations giving effect to the requirement for effective citizen participation in development planning and performance management within the county and such laws and guidelines shall adhere to minimum national requirements.

135. Further to the above constitutional and statutory provisions, the 2nd Respondent made specific provision for public participation in its Standing Orders. Standing Order 131(3) states as follows: -

The Sectoral Committee to which a Bill is committed shall facilitate public participation and shall take into account the views and recommendations of the public when the committee makes its report to the County Assembly.

136. There is no doubt that public participation as contemplated under Articles 10, 174, 196 and 201 of the Constitution, Sections 87 and 115 of the County Governments Act and the 2nd Respondent's Standing Orders is so central in the affairs of public entities, including the legislative processes of the 2nd Respondent.

137. The manner in which public participation is carried out depends on the matter at hand. There is no straight-jacket application of the principle of citizen participation. However, any mode of undertaking public participation which may be adopted by a public entity must factor, in the minimum, the following basic **four parameters**. *First*, the public be accorded reasonable access to the information which they are called upon to give their views on. In other words, the mode of conveying the information to the public reigns. *Second*, the people be sensitized or be made to understand what they are called upon to consider and give their views on. In this case, the *language* used in conveying the information to the public becomes of paramount importance. For instance, if those affected by the intended decisions or the legislation are mostly illiterate, then such realities must be factored in deciding the mode and manner of conveying the information. *Third*, once the public is granted reasonable access to the information and is made to understand it, the public must then be accorded reasonable time to interrogate the information and to come up with its views. *Fourth*, there must be a defined manner in which the public or stakeholders will tender their responses on the matter.

138. The effect of the above constitutional and statutory parameters is to ensure that public participation is realistic and not illusory. Public participation should not be a mere formality, but must accord reasonable opportunity for people to have their say in what affects them. In that way, the dictates of the Constitution and the law will be achieved. (See **Robert M. Gakuru's case** (supra) among others).

139. In this case, the 2nd Respondent's position is that it undertook public participation in respect to the Finance Bill, 2018. The 2nd Respondent posit that it placed an advertisement in the County website under *submissions of memorandum and public participation* and invited the public to air their views on the amendment of the Nairobi County Finance Act of 2015 which resulted into the Finance Act, 2018. The public views were then collected by the appropriate Committee on 29th October, 2018 at Waithaka Social Hall and further on 30th October, 2018 at Jericho Social Hall.

140. I will now subject the manner the Respondents undertook the public participation to the various parameters discussed above.

141. The Respondents adopted two ways in availing the Bill to the public. They were uploading the Finance Bill, 2018 unto the County website and organizing two public meetings.

142. On the aspect of uploading the Bill unto the county website, the Respondents did not state when the Bill was uploaded and what steps they took to inform the public of the same. There is, as well, no record of the people who reside within Nairobi county who access the website either on daily basis or within the period the Bill was uploaded.

143. On the two meetings, suffice to say that Nairobi County is the third smallest County in Kenya. Surprisingly, it is the most populous of the counties projected at around 5 million people. It occupies an area of 696 square kilometres (270 sq. mi). It comprises of 17 Constituencies and 85 Wards.

144. Whereas Waithaka Social Hall is in Waithaka Ward in Dagoretti South constituency, Jericho Social Hall is in Makadara constituency. It, therefore, means that the two public meetings were held in 2 wards out of the 85 wards in the county. The record is silent on the criterion used to settle for the two meetings and how the public was made aware of the meetings. The record is further silent on whether the meetings were duly attended by the targeted people. This Court is also unaware of the number of people who may have attended the meetings, the sectors they represented and the areas they hailed from. This Court is, therefore, not convinced that the Respondents conducted any of the alleged two meetings.

145. Even if this Court takes it that the two meetings were held, still the Respondents ought to have considered other modes of conveying and sensitizing the Bill to the public especially considering that not every resident in Nairobi County may be accessible to the County website and that the public meetings were not publicized. In this case, the use of mass media say like local newspapers, television stations and radio stations would have sufficed. Be that as it may, what of those who were differently-abled, for instance, those who are both blind and deaf?

146. There is also the issue of the language used in the Bill. **Article 7** of the Constitution provides that the national language is Kiswahili while the official languages are Kiswahili and English. The Bill was published in English language. It is unknown how the people who cannot read and/or understand English Language were taken care of. The need to reach out to those who cannot read and/or understand English language was inevitable. The Respondents did not give any reason why they only availed the Bill in English language. The Respondents were bound by Article 7 of the Constitution to, unless for reasons to be given, avail the Bill in Kiswahili language as well.

147. It is also the position that Finance Act, 2018 was comprised of some amendments to the Finance Act, 2015. That means the amendments affected defined classes of people within the County. That being the case, **Article 47** of the Constitution and the *Fair Administrative Actions Act* No. 4 of 2015 (hereinafter referred to as '**the FAA Act**') came into play.

148. **Article 47** of the Constitution provides that: -

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—

(a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and

(b) promote efficient administration.

149. The legislation that was contemplated under Article 47(3) of the Constitution is the FAA Act. **Section 5(1)** thereof provides that: -

(1) In any case where any proposed administrative action is likely to materially and adversely affect the legal rights or interests of a group of persons or the general public, an administrator shall—

(a) issue a public notice of the proposed administrative action inviting public views in that regard;

(b) consider all views submitted in relation to the matter before taking the administrative action;

(c) consider all relevant and material facts; and

(d) where the administrator proceeds to take the administrative action proposed in the notice—

(i) give reasons for the decision of administrative action as taken;

(ii) issue a public notice specifying the internal mechanism available to the persons directly or indirectly affected by his or her action to appeal; and

(iii) specify the manner and period within which such appeal shall be lodged.

150. Section 2 of the FAA Act defines an ‘administrative action’ and an ‘administrator’ as follows: -

‘administrative action’ includes -

(i) The powers, functions and duties exercised by authorities or quasi-judicial tribunals; or

(ii) Any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates;

‘administrator’ means ‘a person who takes an administrative action or who makes an administrative decision’.

151. Addressing itself to the above provisions, the Court of Appeal in **Civil Appeal 52 of 2014 Judicial Service Commission vs. Mbalu Mutava & Another (2015) eKLR** held that: -

Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.

152. Similarly, the High Court in **Republic v Fazul Mahamed & 3 Others ex-parte Okiya Omtatah Okoiti [2018] eKLR** discussed the issue as follows: -

25. In *John Wachiuri T/A Githakwa Graceland & Wandumbi Bar & 50 Others vs The County Government of Nyeri & Ano* [39] the Court emphasized that there are three categories of public law wrongs which are commonly used in cases of this nature.

These are: -

Illegality- Decision makers must understand the law that regulates them. If they fail to follow the law properly, their decision, action or failure to act will be "illegal". Thus, an action or decision may be illegal on the basis that the public body has no power to take that action or decision, or has acted beyond its powers.

Fairness- Fairness demands that a public body should never act so unfairly that it amounts to abuse of power. This means that if there are express procedures laid down by legislation that it must follow in order to reach a decision, it must follow them and it must not be in breach of the rules of natural justice. The body must act impartially, there must be fair hearing before a decision is reached.

Irrationality and proportionality- The Courts must intervene to quash a decision if they consider it to be demonstrably unreasonable as to constitute "irrationality" or 'perversity' on the part of the decision maker. The benchmark decision on this principle of judicial review was made as long ago as 1948 in the celebrated decision of Lord Green in **Associated Provincial Picture Houses Ltd vs Wednesbury Corporation**: -

If decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the Courts can interfere...but to prove a case of that kind would require something overwhelming...

153. Deriving from the above, there is no doubt that the amendments to the Finance Act, 2015 were administrative actions. That is because the amendments affected the legal rights and interests of the Petitioners among other classes of people. As such, the amendments had to pass the constitutional and statutory tests of lawfulness, reasonableness and procedural fairness.

154. On lawfulness, there is no doubt that Article 209 of the Constitution, Section 161 of the PFM Act and other enabling provisions of the law allows Counties to pass and implement legislation on various forms of levies and taxes. Even this case is not an exception. However, in doing so, the Respondents must always ensure that they abide by the Constitution and the law.

155. Whereas the Constitution and the law bestows a duty upon public policy decision makers to accord those affected by their decisions

opportunities to participate in the processes towards making such decisions, the adequacy, mode and extent of such participation largely depends on what is reasonable in the circumstances of each case. That is what is commonly referred to as *'the reasonability test'*.

156. As long as the necessary information is availed to the public or the class of people affected by the public policy decisions and they are afforded a forum in which they can adequately ventilate them, then the constitutional and statutory requirement is met.

157. Having reviewed the law and the facts in this matter, it was incumbent upon the Respondents to ensure that there was reasonable public participation and stakeholders consultation before passing the amendments into the Finance Act, 2018. In attaining such threshold, the Respondents had to at least ensure that: -

(i) Further to uploading the amendments unto the County website (and even if the two meetings were conducted), there was need to adopt other means of informing and sensitizing the public of the amendments. They include *inter alia* placing announcements in the mass media and conducting adequate or clustered public meetings;

(ii) So as to take care of the members of public who were not able to access the internet, there was the need to provide alternative means on how such members would access the amendments. A common trend is to inform the public where they can access physical copies of the amendments;

(iii) Since the Petitioners were in a special class of persons who were most affected by the amendments especially the one on the increase of fees from between Kshs. 100,000/= to Kshs. 500,000/=, the Respondents ought to have ensured that there was consultation with such group of stakeholders;

(iv) There were adequate means of receiving of feedback from the public. Further to the feedback through the internet, there was need for public meetings where members would have physically aired their views on the amendments;

(v) Unless for reasons to be given, the Finance Bill, 2018 or the amendments to the Finance Act, 2015 were in English and Kiswahili languages;

(vi) Reasons were availed in support of the amendments and all the decisions the Respondents made in the process of engaging the public.

158. Resulting from the foregoing, and by taking into account the circumstances of this case, I find that the uploading of the Bill unto the County website and conducting two meetings in 2 wards out of the 85 wards in Nairobi county, if at all the meetings were conducted, still did not attain the threshold of according the public reasonable opportunity to participate in the legislative process.

159. I, therefore, find no difficulty in holding that the Respondents' actions variously infringed Articles 10, 47, 174(c), 196(1)(b) and 201 of the Constitution, Sections 87 and 115 of the County Governments Act, Section 5(1) of the Fair Administrative Actions Act and Standing Order 131(3) of the Nairobi City County Assembly Standing Orders in not according the members of public, including the Petitioners, reasonable opportunity to participate in the process of the enactment of the Finance Act, 2018. The Respondents' actions are, hence, constitutionally infirm.

(iv) Whether the impugned increase of the fees and levies discriminated against the Petitioners:

160. It is true that the impugned amendments were in respect of only some sectors. It is also true that out of the affected sectors, the Petitioners were most affected. This issue, hence, endeavors to determine whether the Petitioners' differential treatment was discriminatory.

161. The position in law that differential treatment is not discrimination was discussed at length in a Multi-Judge bench in ***Petition 56, 58 & 59 of 2019 (Consolidated), Nubian Rights Forum & 2 others v Attorney General & 6 others; Child Welfare Society & 9 others (Interested Parties) [2020] eKLR.***

162. In the case, the Court considered whether differential treatment amounts to violation of the right to equality and non-discrimination as guaranteed under Article 27 of the Constitution. The Learned Judges made reference to various decisions and finally observed as follows: -

983. The precise meaning and implication of the right to equality and non-discrimination has been the subject of numerous judicial decisions in this and other jurisdictions. In its decision in Jacqueline Okeyo Manani & 5 Others v. Attorney General & Another (supra) the High Court stated as follows with respect to what amounts to discrimination:

26. Black's Law Dictionary, 9th Edition defines "discrimination" as (1) "the effect of a law or established practice that confers privileges on a certain class because of race, age sex, nationality, religion or hardship" (2) "Differential treatment especially a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured".

27. In the case of Peter K Waweru v Republic [2006] eKLR, the court stated of discrimination thus: -

Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions whereby persons of one such description are subjected to ... restrictions to which persons of another description are not made subject or have accorded privileges or advantages which are not accorded to persons of another such description... Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age sex ... a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not

favoured.”(emphasis)

28. From the above definition, discrimination, simply put, is any distinction, exclusion or preference made on the basis of differences to persons or group of persons based such considerations as race, colour, sex, religious beliefs political persuasion or any such attributes that has real or potential effect of nullifying or impairing equality of opportunity or treatment between two persons or groups. Article 27 of the Constitution prohibits any form of discrimination stating that. (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law, and that (2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

29. The Constitution advocates for non-discrimination as a fundamental right which guarantees that people in equal circumstances be treated or dealt with equally both in law and practice without unreasonable distinction or differentiation. **It must however be borne in mind that it is not every distinction or differentiation in treatment that amounts to discrimination.** Discrimination as seen from the definitions, will be deemed to arise where equal classes of people are subjected to different treatment, without objective or reasonable justification or proportionality between the aim sought and the means employed to achieve that aim.

30. In this regard, the Court stated in the case of *Nyarangi & 3 Others V Attorney General* [2008] KLR 688 referring to the repealed constitution; “discrimination that is forbidden by the constitution involves an element of unfavourable bias. Thus, firstly unfavourable bias must be shown by the complainant; and secondly, the bias must be based on the grounds set in the constitutional definition of the word “discriminatory” in section 82 of the Constitution.

984. **It is thus recognised that it is lawful to accord different treatment to different categories of persons if the circumstances so dictate.** Such differentiation, however, does not amount to the discrimination that is prohibited by the Constitution. In *John Harun Mwau v. Independent Electoral and Boundaries Commission & Another* (supra), the court observed that:

[i]t must be clear that a person alleging a violation of Article 27 of the Constitution must establish that because of the distinction made between the claimant and others, the claimant has been denied equal protection or benefit of the law. It does not necessarily mean that different treatment or inequality will per se amount to discrimination and a violation of the constitution.

985. When faced with a contention that there is a differentiation in legislation and that such differentiation is discriminatory, what the court has to consider is whether the law does indeed differentiate between different persons; if it does, whether such differentiation amounts to discrimination, and whether such discrimination is unfair. In *EG & 7 others v Attorney General; DKM & 9 others (Interested Parties); Katiba Institute & Another*: Petition 150 & 234 of 2016 (Consolidated) the court held that:

288. From the above definition, it is safe to state that the Constitution only prohibits unfair discrimination. In our view, unfair discrimination is differential treatment that is demeaning. This happens when a law or conduct, for no good reason, treats some people as inferior or less deserving of respect than others. It also occurs when a law or conduct perpetuates or does nothing to remedy existing disadvantages and marginalization.”

986. In *Harksen v Lane NO and Others* (supra) the Court observed that the test for determining whether a claim based on unfair discrimination should succeed was as follows:

(a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate purpose? If it does not, then there is a violation of the constitution. Even if it does bear a rational connection, it might nevertheless amount to discrimination.

(b) Does the differentiation amount to unfair discrimination? This requires a two-stage analysis: -

(i) Firstly, does the differentiation amount to ‘discrimination’? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

(ii) If the differentiation amounts to ‘discrimination,’ does it amount to ‘unfair discrimination’? If it has been found to have been on a specified ground, then the unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation...

(b) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause.

988. It must also be noted, as observed by Mativo J in *Mohammed Abduba Dida v Debate Media Limited & another* (supra) that:

It is not every differentiation that amounts to discrimination. Consequently, it is always necessary to identify the criteria that separate legitimate differentiation from constitutionally impermissible differentiation. Put differently, differentiation is permissible if it does not constitute unfair discrimination. (emphasis added).

163. It is not in dispute that the impugned amendments were in respect of different sectors within the county. Unless otherwise demonstrated, it cannot be expected that the increase of fees and levies across all the sectors be similar.

164. In this case, therefore, the contention by the Petitioners that the increase of fees and levies in their sector ought to have corresponded with the increase of fees and levies in the other sectors cannot hold. Every sector is different unless the correlation and similarity is demonstrated. The Petitioners are members of the same sector and are all providing similar services. There is no claim that some members within the Petitioners' sector were treated differently. The claim only arises when the members of the Petitioners' sector compare themselves with members of other sectors. The Petitioners, hence, failed to demonstrate that the differential treatment undertaken by the Respondents constituted unfair discrimination.

Conclusion and Disposition:

165. The Petition has partly succeeded. Apart from the findings that there was no adequate public participation towards the enactment of the Finance Act, 2018 and further that the Finance Act, 2018 was not published in the Kenya Gazette and County Gazette, the rest of the prayers in the Petition stand disallowed.

166. Flowing from the above discussion, the following orders do hereby issue: -

(a) A Declaration hereby issues that the Nairobi City County Finance Act, 2018 is in violation of Articles 10, 47, 174(c), 196(1)(b) and 201 of the Constitution, Sections 87 and 115 of the County Governments Act, Section 5(1) of the Fair Administrative Actions Act and Standing Order 131(3) of the Nairobi City County Assembly Standing Orders for want of reasonable public participation, stakeholder consultations and administratively fair procedures.

(b) A Declaration hereby issues that the Nairobi City County Finance Act, 2018 further contravenes Article 199(1) of the Constitution and Standing Order 127 of the Nairobi City County Assembly Standing Orders for want of publication in the Kenya Gazette and the County Gazette.

(c) A Declaration hereby issues that the Nairobi City County Finance Act, 2018 is unconstitutional, null and void. It is hereby quashed.

(d) There shall be no order as to costs as the Petition is a public interest litigation.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 1ST DAY OF JULY 2021.

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Mr. Wakwaya, Learned Counsels for the Petitioners.

Mr. Chege, Learned Counsel for the 1st Respondent.

Miss. Waliaula, Learned Counsel for the 2nd Respondent.

Elizabeth Wambui – Court Assistant